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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 1017

JAN EMIL DONATO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

Opinion of the Court Below	2
Statutory Provision Sustaining Jurisdiction	2
Questions Presented and How Raised	2
Statutes and Regulations Involved	3
Statement of the Case	3
The Facts	4
Reasons for Granting the Writ	7
Conclusion	11
Appendix A, Final Opinion of the United States Court of Appeals	A1
Appendix B, Prior Opinion of the United States Court of Appeals	A3
Appendix C, Order Denying Petition for Rehearing	A7
Appendix D, Order Extending Time to File Petition for Writ of Certiorari	A8

Table of Cases

Cox v. *U. S.*, 332 U.S. 442, 68 S. Ct. 115, 92 L. Ed. 59	10
Falbo v. *United States*, 320 U.S. 549 (1944)	7, 8
Niznik v. *U. S.*, (C.A. 6) 173 F.2d 328	10
Peterson v. *U. S.*, (C.A. 6) 173 F.2d 111	10
Powell v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527	10

Texts and Statutes

32 C.F.R., § 1622.10	5
32 C.F.R., §§ 1624.1 (b) and 1626.2 (a)	3, 9
32 C.F.R., § 1626.2	7
United States Constitution, Amendment V	3
U.S.C., Title 50, App., Sec. 462 (Universal Military Training and Service Act)	3
18 U.S.C., § 3231	2
28 U.S.C., Section 1254 (1)	2

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The final opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages . It is also set forth as Appendix A to this petition.

The prior opinion of said Court of Appeals is reported in 302 F.2d 468 and is also set forth as Appendix B to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The final judgment of the Court of Appeals (denial of the seasonably filed Petition for Rehearing) was entered on February 26, 1963 [R. :* also see Appendix C to this petition]. The petition for writ of certiorari is filed within the required thirty days' time, as extended by order of Mr. Justice Douglas (Appendix D).

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The district court has jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The record shows that petitioner reported for but did not submit to induction [Ex. 2-3]. He testified he intended to perfect an administrative appeal from the 1-A classifica-

*All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1. All references to the file are designated by pages of Exhibit 1, as follows: [Ex. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, and ordinarily is found at the bottom of each sheet of Exhibit 1.

tion but did not do so due to frustration by reason of a forest fire-fighting call [R.].

Where a Selective Service System registrant charged (in a one count indictment) with refusing to submit to induction is tried on a record made wholly without benefit of counsel, one made under administrative agency regulations that prohibit the employment of an attorney at his Appearance Before Local Board:

Is he required to take every intermediate administrative step to have standing in court to present his defenses?

II. Is he entitled to a trial *de novo* on the relevant facts?

4. STATUTES AND REGULATIONS INVOLVED

Amendment V of the Constitution and 32 C.F.R. §§ 1624.1 (b) and 1626.2 (a) of the regulations are involved. They are set forth in the Reasons for Granting Writ.

5. STATEMENT OF THE CASE

Petitioner was indicted under U.S.C. Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction [R. 2].

Petitioner pleaded Not Guilty, waived jury trial and was thereafter tried and convicted on May 1, 1961 [R. 4], by Judge William M. Byrne. Petitioner was sentenced on May 22, 1961 [R. 5].

At close of the evidence, a Motion for Judgment of Acquittal was made, argued, and denied [T. 36].

On appeal the Ninth Circuit remanded, 302 F.2d 468, Appendix B to this petition.

On April 24, 1962, the trial court certified to the Court of Appeals by a formal Certificate [R. 10] that it had considered the remand [T. 40], and

On April 24, 1962, appellant was resentenced to three years imprisonment [R. T. 49].

On the second appeal the Ninth Circuit affirmed F.2d , Appendix A to this petition.

6. THE FACTS

Petitioner registered with California Local Board No. 85 on January 18, 1955 [Ex. 1-2].

Thereafter he timely filed the standard eight page Classification Questionnaire on February 21, 1955 [Ex. 5-12]. In it he showed he was one of Jehovah's Witnesses, was a minister of religion, regularly serving as such and had been formally ordained [Ex. 7]. He also showed he was a fulltime student at Glendale High School [Ex. 10] and that he was a conscientious objector to participation in warfare [Ex. 11]. He advanced no opinion, at the place provided, concerning the classification he deemed proper to his factual status [Ex. 11, below 7].

Thereafter he timely filed the four page Special Form for Conscientious Objector on March 3, 1955 [Ex. 13]. In it he showed he was opposed to participation in warfare by reason of religious training and belief and that this was in relation to his belief in a Supreme Being [Ex. 13]. He gave scriptural authority to support his statements and reasoning [Ex. 13 (a)]. He explained the part his home teachings had played, he submitted the name and address of a leader of the witnesses in response to the question [=4] upon whom he relied most for religious guidance; he answered question =5 (Under what circumstances, if any,

do you believe in the use of force?) as follows: "I believe in using force in protecting my home against crime or violence, my scriptural reference is in Exodus 22:2." [Ex. 14].

He related his studies and religious activities and how he gave public expression to his views. He gave all details requested of his schooling and employment going back to 1942 [Ex. 14].

He gave the Selective Service System further opportunity for checking the details of his showing by giving at question (=6) all residence addresses since 1937 [Ex. 15].

He showed he was a member of a recognized religious organization, gave its national headquarters address and his local church and local leader and answered all other questions propounded [Ex. 15], including the names and addresses of references using all the spaces provided [Ex. 16]. He appended a letter of even date from the head of the Ministry School of his group attesting to his sincerity [Ex. 15 (a)].

There is no evidence in the file to rebut his *prima facie* case for one of the two conscientious objector classifications.

Nevertheless, the local board, after having plenty of time to check his statements and enter its findings in the file concerning such a check-up [it did not classify him until thirty-five months later, February 19, 1958] classified him Class 1-A (Available for Military Service, § 1622.10, 32 C.F.R.) [Ex. 12].

Thereafter, on July 13, 1960, petitioner had an Appearance Before Local Board. Draft registrants are forbidden to bring an attorney to such a hearing. See Argument. A summary of said meeting was prepared and filed

by the local board [Ex.]. This summary shows the positions of both the petitioner and of the board: Petitioner frankly volunteered that he understood his ministry activity did not meet the ministry classification standards of the Selective Service System and stated "I think I should have a 1-O which is the conscientious objector." [Ex. 29].

The local board's position was that it would not change its classification after learning the following:

1. He would not "go to work if ordered as a 1-O" [Ex. 29].

2. He would protect his relatives in their homes against enemies [Ex. 29].

In court he complained of the accuracy of the summary's account by testifying that the following was the actual statement made by him:

> "I was asked by the Board what I would do in the case of an enemy attack, and for example say my parents, my father and mother were in need of help, they wanted to know if I would protect them. I told them if my father and mother were under my roof, under my support, I would feel it my duty to protect them from any violence of any kind." [T. 29].

He did not take an appeal for reasons that were related in his testimony; he had made up his mind "to take an appeal within the 10 days" [T. 29], but that he was notified he should get ready for a fire in the Angelus National Forest and that he was called to fight this fire on the 20th and was kept in this area fighting fires until the 28th [T. 30].

7. REASONS FOR GRANTING THE WRIT

I.

A question important to hundreds of draft registrants is presented by this petitioner. It has not been determined by this Court but should be.

It is whether a selective service registrant, professing to be a conscientious objector who reports at the induction station as ordered and there refuses to submit to induction has "exhausted his administrative remedies." Hasn't he gone to the end of the line, as required by this court in *Falbo* v. *United States*, 320 U.S. 549 (1944)? Put another way: Is an intermediate step provided by the regulations and couched in permissive language really a mandatory step? 32 C.F.R. § 1626.2.

1626.2 Appeal by Registrant and others.—(a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from the classification of a registrant by the local board in any class other than Class I-C, Class I-W, Class IV-F, and Class V-A.

The appeal opportunity above referred is but one of several administrative steps available to a registrant aggrieved over a rejection of his claim for a particular classification. All steps before the Order to Report for Induction (except Order to Report for Physical Examination) are permissively worded as is the above § 1626.2. Further, nowhere is the registrant cautioned that he must take this one or that one to have standing in court to complain of misclassification or of denial of procedural due process.

It seems clear that all these intermediate steps are optional, that they are like rungs of a ladder and that arriving at the end of the ladder is the essential step to "complete the selective process" as held in *Falbo, supra.* This Donato did. He reported for but refused to submit to induction.

The primary question presented is whether the rule of exhaustion of remedies should be applied to a case like this so as to exclude an otherwise meritorious defense against a criminal charge. As the dissent in the first appeal of this case pointed out the non-application of the rule would not free the defendant; and the only burden imposed on the trial courts would be that of hearing the defense.

If the rule should be applied in criminal cases the next question is how harshly it should be applied. Should it ever be applied where the sentence, as here, can be a prison term whose length approximates that of the entire adult life of the defendant?

If the rule is applicable to cases where the possible loss to the defendant is so great compared with the effort required of the court, is the rule applicable where defendant may have been unaware of the grave consequences of his lack of action?

It was held by the Ninth Circuit in its last opinion in this case (302 F.2d 468, 470) that even if the answers to the above questions are affirmative, still the rule is not applicable unless the omission was "deliberate." Does this mean that deliberate intent must be shown, *i. e.*, must the record show that defendant deliberately refused to act? We believe it must; we point out that no such evidence was presented or even referred to.

If application of the rule does not require demonstration of deliberate ill intent doesn't this mean that the burden has been shifted to the defendant of proving his innocence? If this remarkable conclusion were correct, exhaustion of administrative remedies would emerge as a potent weapon for those who would shortcut the entire system of evidentiary rules laboriously erected through ten centuries of Anglo-Saxon law.

A second reason for granting the writ is that a second question should be decided:

Does the Fifth Amendment prohibit the conviction of a defendant where all the following elements are present:

(a) The government's case is entirely based on an administrative record.

(b) The administrative record was made entirely without benefit of counsel, the agency's regulations forbidding counsel at the hearing, and

(c) Unanimous and long-standing judicial interpretation prohibits a trial de novo on the relevant facts?

32 C.F.R. § 1624.1 (b):

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: Provided, that if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: And provided further, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel

It is beyond dispute, therefore, that both the regulations and the decisions forbid a selective service registrant to build his record with assistance of counsel.

It is the contention of petitioner that at some stage of these proceedings he is entitled to the assistance of counsel in making the record on which his liberty is to depend, either before the administrative tribunal or in the district court. The assistance of counsel in the district court is of small consequence if the record on which appellant is tried and by which he is bound was made without the right to counsel.

If this contention is not sound, then the personal appearance of a registrant before the Local Board is a trap.

Many cases hold that a denial of counsel before the Board is not a denial of due process of law. *Niznik* v. *U. S.*, (C.A. 6) 173 F.2d 328; *Peterson* v. *U. S.*, (C.A. 6) 173 F.2d 111. It is also well settled that a defendant is bound by the Board's classification; however erroneous, if there was any substantial basis for the classification order. *Cox* v. *U. S.*, 332 U.S. 442, 68 S. Ct. 115, 92 L. Ed. 59. Yet it is fundamental in our system of jurisprudence that a person accused of crime has the right to be represented by counsel. In the leading case of *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527, this court said at pages 68-69:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. * * *
>
> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of

little avail if it did not comprehend the right to be heard by counsel. * * *"

It is perfectly consistent with due process of law to hold a defendant bound by a factual record made before an administrative tribunal. It is consistent with due process of law to deny a party counsel in an administrative hearing. But it is not consistent with due process of law for an administrative agency to summon a party before it for hearing, deny him counsel at such hearing by regulation and then hold him bound on a criminal trial by the factual record made at such a hearing.

A citizen is entitled either to the assistance of counsel before the Local Board or to a trial de novo on the facts and law in the District Court.

CONCLUSION

This petition should be granted for one or both of the two reasons herein stated.

Respectfully submitted,

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April 15, 1963.